

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 MARIETTA DIANNE YAW,
9 Individually and as Executor of the
Estate of DONALD ARTHUR YAW

10 Plaintiff,

v.

11 AIR & LIQUID SYSTEMS
12 CORPORATION, et al.,

13 Defendants.

CASE NO. C18-5405 BHS

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

14 This matter comes before the Court on Defendants General Electric Company
15 ("General Electric"), CBS Corporation ("Westinghouse"), and Foster Wheeler Energy
16 Corporation's ("Foster Wheeler") ("Defendants") motion for summary judgment. Dkt.
17 95. The Court has considered the pleadings filed in support of and in opposition to the
18 motion and the remainder of the file and hereby grants the motion for the reasons stated
19 herein.
20
21
22

I. PROCEDURAL HISTORY

On May 21, 2018, Plaintiffs Donald and Marietta Yaw (“the Yaws”) filed a complaint against numerous defendants alleging injuries to Mr. Yaw resulting from exposure to asbestos. Dkt. 1.

On January 31, 2019, Defendants filed a motion for summary judgment arguing in part that the Yaws had no evidence to support their claims against Defendants. Dkt. 95.

On February 19, 2019, the Yaws responded to Defendants’ motion and requested a continuance because they were missing facts essential to justify their opposition. Dkt. 106. On February 22, 2019, Defendants replied. Dkt. 111. On March 18, 2019, the Yaws filed a supplemental response and submitted the expert reports of Dr. John Maddux and Captain Arnold Moore (“Moore”). Dkts. 132, 133-1.

On March 21, 2019, the Yaws filed a motion to amend their complaint informing the Court that Mr. Yaw passed away. Dkt. 140.

On March 22, 2019, Defendants filed a surreply requesting that the Court strike the Yaws’ supplemental response and expert reports.¹ Dkt. 144.

On April 18, 2019, the Court granted the Yaws’ motion to amend, granted the Yaws’ request for a continuance of the summary judgment motions, and requested additional briefing in light of the Supreme Court’s decision in *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019) (“*DeVries*”). Dkt. 154.

¹ The Court denies the motion to strike because Defendants are not prejudiced if the Court considers the evidence.

1 On April 26, 2019, Marietta Yaw, individually and as personal representative of
2 the Estate of Donald Yaw, (hereinafter “Yaw”) filed her amended complaint. Dkt. 155.
3 Yaw’s claims are as follows:

4 Plaintiff claims liability based upon the theories of product liability,
5 including, but not limited to negligence, strict product liability (for
6 example, Restatement (Second) of Torts § 402A and/or 402B), conspiracy,
7 premises liability, the former RCW 49.16.030, and any other applicable
8 theory of liability, including, if applicable, RCW 7.72 et seq.

9 The manufacturer/distributor defendants identified above are liable
10 for, among other things, the following conduct: negligent and unsafe
11 design; failure to inspect, test, warn, instruct, monitor and/or recall; failure
12 to substitute safe products; marketing products not reasonably safe as
13 manufactured; marketing products not reasonably safe as designed; and
14 marketing products not reasonably safe for lack of adequate warnings.

15 Certain Defendants engaged in concerted, and/or conspiratorial
16 activities or omissions which prevented adequate warnings concerning the
17 hazards of asbestos and asbestos-containing products from being provided
18 to those using or exposed to asbestos and asbestos-containing products.
19 These activities also resulted in the manufacture and distribution of
20 products that were not reasonably safe as designed.

21 *Id.* ¶¶ 31–33.

22 On May 2, 2019, Defendants filed a supplemental brief in support of their motion
for summary judgment. Dkt. 164. On May 20, 2019, Yaw responded. Dkt. 173. On
May 24, 2019, Defendants replied. Dkt. 176.

23 II. FACTUAL BACKGROUND

24 The majority of the relevant facts in this matter are undisputed. Mr. Yaw worked
25 at the Puget Sound Naval Shipyard (“PSNSY”) from 1964 through 2001. During the first
26 part of his career, Mr. Yaw was a shipfitter, which Mr. Yaw describes as a steelworker
27 who actually builds the ships. Mr. Yaw recalled working on numerous ships including
28 the USS Simon Lake, USS Kitty Hawk, USS Cusk, USS Seattle, USS Ranger, USS

1 Sacramento, USS John Adams, USS Constellation, USS Enterprise, USS Truxton, USS
2 Bainbridge, and USS Ulysses S. Grant. It is undisputed that, at some point, some of these
3 ships were equipped with products that either included parts with asbestos such as
4 gaskets and seals or required additional parts with asbestos such as insulation. The
5 problem, however, is that Mr. Yaw failed to remember working on any particular product
6 on any particular ship. *See* Dkt. 95 at 3 (summarizing Yaw deposition). Yaw attempts to
7 overcome this failure by citing Mr. Yaw’s deposition stating that he was in engine rooms
8 and boiler rooms that were dusty. Dkt. 106 at 3–4. Then Yaw leaps to certain
9 conclusions as follows: “If asbestos-insulated turbines manufactured by General Electric
10 were installed on ships Mr. Yaw worked on as a ship fitter, then he was exposed to
11 asbestos from work performed on General Electric turbines. Similarly, Mr. Yaw was
12 exposed to asbestos from Westinghouse turbines if any asbestos-insulated Westinghouse
13 turbines were installed on ships he worked on as a ship fitter. . . . If Mr. Yaw worked on
14 ships installed with asbestos-insulated Foster Wheeler boilers, then he was exposed to
15 asbestos from Foster Wheeler boilers.” *Id.* at 5–6.

16 Yaw also submitted expert reports. Dkt. 133-1. Moore is an expert in
17 maintenance and work practices aboard Navy ships. *Id.* at 4. He opines that (1) “Mr.
18 Yaw worked in spaces where other workers were removing asbestos insulation from 1964
19 until 1978. He likely worked in spaces where other workers were removing and replacing
20 asbestos packing and gaskets for the entire time he worked as a shipfitter from 1964
21 through 1980,” *id.* at 8, and that (2) “it is more likely than not that the pumps, valves and
22 other machinery and equipment installed on the ships upon which Mr. Yaw worked as a

1 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
2 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
3 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
4 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
5 626, 630 (9th Cir. 1987).

6 The determination of the existence of a material fact is often a close question. The
7 Court must consider the substantive evidentiary burden that the nonmoving party must
8 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
9 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
10 issues of controversy in favor of the nonmoving party only when the facts specifically
11 attested by that party contradict facts specifically attested by the moving party. The
12 nonmoving party may not merely state that it will discredit the moving party’s evidence
13 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
14 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
15 nonspecific statements in affidavits are not sufficient, and missing facts will not be
16 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

17 **B. Defendants’ Motion**

18 In their original motion, Defendants moved for summary judgment for three
19 reasons as follows: (1) Yaw fails to submit evidence to establish that he was exposed to
20 asbestos from a product manufactured by Defendants, (2) assuming that Yaw submits
21 evidence that he worked with or around a product manufactured by Defendants, the
22 record is devoid of evidence that Defendants manufactured the insulation or any other

1 asbestos product that was purportedly used in conjunction that product, and (3) Yaw is
2 unable to establish causation because Mr. Yaw testified that he knew he was working in
3 dangerous dusty conditions and failed to take adequate measures to safeguard his health.
4 Dkt. 95. Yaw responded that (1) Defendants are still liable for failure to warn even if
5 they provided “bare metal” equipment to the Navy, (2) questions of fact exist regarding
6 Mr. Yaw’s decisions regarding the use of safety equipment, and (3) the Court should
7 grant a continuance until Yaw submits expert reports regarding Mr. Yaw’s actual
8 exposure to relevant products. Dkt. 106. While it appears that Yaw is correct as to the
9 issues of Defendants providing warnings and Mr. Yaw’s stated refusal to use adequate
10 precautions, the first issue Defendants present is dispositive.

11 In a product liability action, any claim requires exposure to the product. For
12 example, on a general maritime negligence claim the plaintiff must show that “he was
13 actually exposed to asbestos-containing materials . . . and that such exposure was a
14 substantial contributing factor in causing his injuries.” *McIndoe v. Huntington Ingalls*
15 *Inc.*, 817 F.3d 1170, 1174 (9th Cir. 2016) (citing *Lindstrom v. A–C Prod. Liab. Tr.*, 424
16 F.3d 488, 492 (6th Cir. 2005) *abrogated on other grounds by DeVries*). Similarly, in
17 Washington “the plaintiff must establish a reasonable connection between the injury, the
18 product causing the injury, and the manufacturer of that product. In order to have a cause
19 of action, the plaintiff must identify the particular manufacturer of the product that caused
20
21
22

1 the injury.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 245–47 (1987) (quoting *Martin*
2 *v. Abbott Laboratories*, 102 Wn.2d 581, 590 (1984)).²

3 In this case, Yaw fails to submit evidence to establish any connection between
4 Defendants’ products and Mr. Yaw injuries. At most, Yaw submits evidence to establish
5 that sometimes he was in engine and boiler rooms that contained dust. This is the extent
6 of the relevant evidence on the issue of exposure that has been presented by a fact
7 witness. In other words, Yaw fails to identify a specific time that he was on a particular
8 ship and exposed to a particular product that had produced or was producing asbestos
9 dust. Due to this lack of factual evidence, Yaw is forced to rely on reasonable inferences.
10 *See Scott v. Harris*, 550 U.S. 372, 378 (2007) (“courts are required to view the facts and
11 draw reasonable inferences ‘in the light most favorable to the party opposing the
12 [summary judgment] motion.’”) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654,
13 655 (1962)). Yaw, however, fails to advance any reasonable inference. Instead, she
14 relies on mere speculation that is devoid of any attachment to a fact. For example, she
15 asserts that “[i]f asbestos-insulated turbines manufactured by General Electric were
16 installed on ships Mr. Yaw worked on as a ship fitter, then he was exposed to asbestos
17 from work performed on General Electric turbines.” Dkt. 106 at 5. Even if this assertion
18 were true, it would require a prerequisite fact that Mr. Yaw was on a ship near a General
19 Electric turbine. Unfortunately, that fact does not exist in this record. Thus, Yaw fails to
20

21 ² The Court cites both federal maritime law and Washington state law because Yaw’s claims are
22 extremely vague. Yaw, however, appears to implicitly accept that her claims may only be brought under
these two bodies of law because she does not challenge Defendants’ arguments under or citations to these
laws.

1 establish even minimal exposure to asbestos yet alone exposure to one of Defendants'
2 products that contained asbestos. *McIndoe*, 817 F.3d at 1176 (“Evidence of only minimal
3 exposure to asbestos is insufficient” to establish causation); *Lindstrom*, 424 F.3d at 492
4 (“a mere showing that defendant’s product was present somewhere at plaintiff’s place of
5 work is insufficient.”).

6 Moore’s report fares no better in establishing causation. While he states that “Mr.
7 Yaw worked in spaces where other workers were removing asbestos insulation from 1964
8 until 1978,” neither Moore nor Yaw can establish the factual underpinnings of this
9 statement. In fact, Moore testified that Mr. Yaw failed to identify working on a specific
10 location on a specific ship. Dkt. 171-1 at 15 (“that information simply does not exist in
11 [Mr. Yaw’s] deposition”). If the fact witness is unable to establish his location, then an
12 expert opinion based on nothing more than that fact witness’s testimony is also
13 insufficient to establish the witness’s proximity to a particular product. Thus, Moore’s
14 opinion that Mr. Yaw was exposed to asbestos from Defendants’ products is based on
15 nothing more than speculation that a person who worked on ships at PSNSY *must* have
16 been exposed to some asbestos. It is questionable whether this opinion is even
17 admissible under the rules of evidence because it lacks adequate factual support from the
18 materials and information reviewed to form the opinion. Regardless, the Court finds that
19 Moore’s opinion fails to fill the gap in Mr. Yaw’s failure to identify any specific
20 exposure to Defendants’ products. Accordingly, Defendants are entitled to summary
21 judgment because Yaw fails to establish a genuine issue of fact on the issue of causation.
22

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion for summary
3 judgment, Dkt. 95, is **GRANTED**.

4 Dated this 2nd day of August, 2019.

5 

6
7 BENJAMIN H. SETTLE
United States District Judge